Herman Ando v Tactland Development Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–207 OF 2004, W-02–1021 OF 2004, W-02–34 OF 2007 AND W-02–1098 OF 2008

GOPAL SRI RAM, RAUS SHARIF AND SULONG MATJERAIE JJCA

16 JULY 2009

Civil Procedure — Contempt of court — Contravention of injunction — Deliberate breach — Admission of breach and apology — Whether contempt of court

Civil Procedure — Functus officio — Principles of — Whether issues already dealt upon could be re-opened — Whether judge has power to review, rehear, vary or set aside part of any judgment once formally recorded

Civil Procedure — Injunction — Contravention of — Deliberate breach — Admission of breach and apology — Whether contempt of court

Civil Procedure — Injunction — Interim mandatory injunction — Principles applicable — Developer of adjacent land required to repair damage and cracks caused to plaintiff's house — Whether damages adequate remedy — Whether plaintiff's house put to further risk and destruction if remedial works not effected immediately

Civil Procedure — Judgments and orders — Amendment of — Variation or revocation of order — Whether court could vary or revoke earlier order

Civil Procedure — Judgments and orders — Application for setting aside — Application to set aside fair copy of order as amended by judge — Referral of draft order with amended terms to judge for approval — Whether judge erred in amending draft order made by another judge

The defendant was a development company developing a project site. The plaintiff's house was situated adjacent to the project site. The plaintiff claimed that earthworks carried out by the defendant's contractors had caused

surface and structural cracks affecting the foundation and safety of the plaintiff's house. Four inter-related appeals were heard together. The first appeal was the defendant's appeal against the interlocutory injunctive orders granted by Azmel Maamor J on 10 February 2004 which stated that: (1) the defendant was restrained from further carrying out the development work (prohibitory order); and (2) the defendant was required to carry out repairs of the damage and cracks of the plaintiff's house forthwith (mandatory order). The defendant claimed that the mandatory injunction should not have been granted as the plaintiff had not shown an unusually strong and clear case and that there were special circumstances for the court to grant the relief. Upon the defendant's application Azmel Maamor J had on 30 August 2004 set aside the mandatory injunction he had earlier granted on 10 February 2004. In setting aside the mandatory injunction, His Lordship stated that he had only intended to give the prohibitive injunction and not the mandatory injunction. The second appeal was the plaintiff's appeal against the decision of Azmel Maamor J in varying the orders that he had earlier made on 10 February 2004. The issue arising here was whether His Lordship had the power to review his own order. The third appeal was the defendant's directors' appeal against the decision of Abdul Malik Ishak J who had found them guilty for contempt of the order dated 10 February 2004. Counsel for both parties had produced a draft order with amended terms that they had agreed upon and requested Mohd Yazid Mustafa JC to approve it. However, Mohd Yazid Mustafa JC did not approve the order as agreed by the parties. Instead he approved the draft order which he perceived to be in line with the terms granted by Azmel Maamor J. The plaintiff then applied (vide encl 163) for the order as approved by Mohd Yazid Mustafa JC to be set aside or expunged. The application was dismissed. The fourth appeal was the plaintiff's appeal against this decision of Mohd Yazid Mustafa JC.

Held, allowing the second and fourth appeals with costs and dismissing the first and third appeals with costs:

(1) There were serious issues and strong prima facie case to justify the decision in granting the injunctions. It was not unreasonable to conclude that the cracks to the plaintiff's house must be the result of the earthworks done by the defendant's contractors. The facts raised serious question to be tried and inquired into further. The balance of convenience and the importance of maintaining the status quo clearly lay with the plaintiff. The damages caused to the plaintiff's house were structural cracks and damages could not possibly be an adequate remedy considering the fact that the premises was a family home and that the plaintiff should not be put to further risk and destruction of the house if remedial works are not effected by the defendant (see paras 21–23).

(2) The question whether or not the court could have given the mandatory injunction had been dealt upon hearing the arguments on merit in the plaintiff's application for injunctive orders. Therefore, the issue could not be re-opened and Azmel Maamor J was precluded from doing so upon the doctrine of functus officio. Azmel Maamor J had no power to review, rehear, vary or set aside part of any judgment once it was formally recorded. Hence, the order made on 30 August 2004 was a nullity (see para 29).

(3) The issues that the mandatory injunction had been set aside or that the mandatory injunction was ambiguous, uncertain or indefinite and thus void, were never raised during the contempt proceedings before Abdul Malik Ishak J. The defendant knew of the terms of the injunctive orders sought by the plaintiff. At the hearing before Abdul Malik Ishak J, both the defendant's directors admitted breaching the mandatory injunction. They apologised to the court for their failure to comply with Azmel Maamor J's order dated 10 February 2004. It was clear that the directors had deliberately defied the court's order (see paras 33–34 & 39).

(4) The plaintiff's application in encl 163 was not to vary the order of Azmel Maamor J of 30 August 2004. What the plaintiff intended to achieve by encl 163 was to set aside the fair copy issued by the learned judicial commissioner ('JC'). The reason being the learned JC had ignored what had been agreed between the parties. There was merit on the plaintiff's complaint. Since those parties were present before Azmel Maamor J when the 30 August 2004 order was given they were in the best position to know what the order should be. They were in better position than the JC to know what had actually transpired before Azmel Maamor J. The learned JC should have approved the order as agreed by the parties and allowed the application in encl 163 (see paras 44–45).

[Bahasa Malaysia summary

Defendan merupakan syarikat pemaju membangunkan tapak projek. Rumah plaintif bersebelahan dengan tapak projek tersebut. Plaintif mendakwa kerja-kerja tanah yang dijalankan oleh kontraktor-kontraktor defendan mengakibatkan keretakan di permukaan dan struktur yang menjejaskan dasar dan keselamatan rumah plaintif. Empat rayuan yang berhubung kait didengar bersama. Rayuan pertama merupakan rayuan defendan terhadap perintah-perintah bersifat injunktif interlokutori yang diberi oleh Hakim Azmel Maamor pada 10 Februari 2004 yang menyatakan: (1) defendan ditegah daripada meneruskan kerja-kerja pembangunan (perintah larangan); dan (2) defendan dikehendaki membaiki kerosakan dan keretakan rumah plaintif (perintah mandatori). Defendan menyatakan bahawa injunksi mandatori tersebut tidak seharusnya diberikan kerana plaintif tidak

menunjukkan kes yang betul-betul kukuh dan jelas dan juga tiada keadaan istimewa yang mengharuskan mahkamah memberikan relief tersebut. Atas permohonan defendan, pada 30 Ogos 2004 Hakim Azmel Maamor telah mengetepikan injunksi mandatori tersebut, Hakim yang Mulia menyatakan bahawa dia berniat untuk hanya memberikan injunksi larangan dan bukannya injunksi mandatori. Rayuan kedua merupakan rayuan plaintif terhadap keputusan Hakim Azmel Maamor yang mengubah perintah-perintah yang telah beliau berikan pada 10 Februari 2004. Isu yang berbangkit di sini ialah sama ada Hakim yang Mulia mempunyai kuasa untuk menyemak perintahnya sendiri. Rayuan ketiga merupakan rayuan pengarah-pengarah defendan terhadap keputusan Hakim Abdul Malik Ishak yang mendapati mereka bersalah atas menghina perintah bertarikh 10 Februari 2004. Peguam kedua-dua pihak mengemukakan draf perintah bersama terma-terma pindaan yang telah dipersetujui dan meminta Pesuruhjaya Kehakiman Mohd Yazid Mustafa mengesahkannya. Namun, Pesuruhjaya Kehakiman Mohd Yazid Mustafa tidak mengesahkan perintah seperti yang dipersetujui pihak-pihak. Sebaliknya, beliau mengesahkan draf perintah yang beliau dapati selari dengan terma-terma yang telah diberikan oleh Hakim Azmel Maamor. Plaintif kemudiannya, (menerusi lampiran 163) memohon, perintah yang disahkan oleh Pesuruhjaya Kehakiman Mohd Yazid Mustafa diketepikan atau dipotong. Permohonan tersebut ditolak. Rayuan keempat merupakan rayuan plaintif terhadap keputusan Pesuruhjaya Kehakiman Mohd Yazid Mustafa.

Diputuskan, membenarkan rayuan kedua dan keempat dengan kos dan menolak rayuan pertama dan ketiga dengan kos:

(1) Terdapat isu-isu serius dan kes prima facie yang kukuh yang mewajarkan keputusan membenarkan injunksi-injunksi. Adalah munasabah merumuskan bahawa keretakan pada rumah plaintif adalah disebabkan daripada kerja-kerja tanah yang dilakukan oleh kontraktor-kontraktor defendan. Fakta-fakta tersebut menimbulkan persoalan serius yang perlu dibicarakan dan disiasat dengan teliti. Imbangan kesenangan dan kepentingan mengekalkan status quo jelas di pihak plaintif. Kerosakan pada rumah plaintif merupakan keretakan pada struktur dan ganti rugi tidak mungkin merupakan remedi yang berpatutan memandangkan premis itu merupakan kediaman keluarga dan plaintif tidak harus diletakkan dalam risiko yang berlanjutan jika kerja-kerja membaikpulih tidak dilakukan oleh defendan (lihat perenggan 21–23).

(2) Persoalan sama ada mahkamah boleh memberikan injunksi mandatori telahpun dibincangkan apabila mendengar hujah-hujah atas merit dalam permohonan plaintif untuk perintah-perintah injunktif. Oleh

itu, isu tersebut tidak boleh dibincangkan semula dan Hakim Azmel Maamor dihalang daripada berbuat demikian atas doktrin functus officio. Azmel Maamor tiada kuasa untuk menyemak, mendengar semula, mengubah atau mengetepikan mana-mana bahagian penghakiman apabila penghakiman tersebut direkodkan secara rasminya. Maka, perintah pada 30 Ogos 2004 adalah tidak sah (lihat perenggan 29).

(3) Isu-isu bahawa injunksi mandatori tersebut telah diketepikan atau injunksi mandatori tersebut samar-samar, tidak jelas atau tiada kepastian dan justeru itu terbatal, tidak pernah dibangkitkan semasa prosiding penghinaan di hadapan Hakim Abdul Malik Ishak. Defendan maklum akan terma-terma perintah-perintah injunktif yang dipohon oleh plaintif. Semasa pendengaran di hadapan Hakim Abdul Malik Ishak, kedua-dua pengarah defendan mengaku melanggar injunksi mandatori tersebut. Mereka memohon maaf kepada mahkamah atas kegagalan mereka mematuhi perintah Azmel Maamor bertarikh 10 Februari 2004. Adalah jelas bahawa pengarah-pengarah tersebut sengaja menentang perintah mahkamah tersebut (lihat perenggan 33–34 & 39).

(4) Permohonan plaintif dalam lampiran 163 bukanlah untuk mengubah perintah Hakim Azmel Maamor yang dibuat pada 30 Ogos 2004. Apa yang diinginkan oleh plaintif melalui lampiran 163 adalah untuk mengetepikan salinan bersih yang dikeluarkan oleh pesuruhjaya kehakiman ('PK'). Sebabnya ialah PK yang bijaksana tidak mengendahkan apa yang telah dipersetujui antara pihak-pihak. Aduan plaintif itu bermerit. Oleh sebab pihak-pihak tersebut hadir di hadapan Hakim Azmel Maamor ketika perintah pada 30 Ogos 2004 diberikan mereka tentunya lebih mengetahui akan perintah yang selayaknya bagi mereka. Mereka lebih mengetahui daripada PK tersebut apa yang sebenarnya terjadi di hadapan Hakim Azmel Maamor. PK tersebut seharusnya mengesahkan perintah sepertimana yang dipersetujui pihak-pihak dan membenarkan permohonan di lampiran 163 (lihat perenggan 44–45).]

Notes

For a case on functus officio principles, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2833.

For cases on amendment of judgments and orders, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4020–4026.

For cases on application for setting aside, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4032–4046.

For cases on contempt of court generally, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1716–1866.

A For cases on interim mandatory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3222–3223.
For cases on judgments and orders generally, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4017–4288.

B **Cases referred to**

American Cynamid Co v Ethicon Ltd [1975] AC 396, HL (refd)
Hock Hua Bank v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
C *Swire, Mellor, Re v Swire* (1885) 30 Ch D 239 (not folld)
William Laurie v George Lees (1881) 7 App Cas 19, HL (not folld)

Legislation referred to

Rules of the High Court 1980 O 20 r 11, O 42 r 13
D

Ashokvijay Sanghrajka (Paari Perumal with him) (TK Wong, Tan & Associates) for the plaintiff.
Sulaiman bin Abdullah (A Nedu Maran with him) (Nedu Maran & Partners) for the defendant.

E

Raus Sharif JCA:

INTRODUCTION

F **[1]** There are four inter-related appeals involving the same parties before the court. With the agreement of the parties, this court heard the four appeals together. The appeals are:

(a) W-02–207 of 2004

G An appeal by the defendant against the decision of Azmel Maamor J (as he then was) on 10 February 2004 in ordering interim injunctive orders (prohibitory and mandatory) against the defendant (first appeal).

H (b) W-02–1021 of 2004

An appeal by the plaintiff against the decision of Azmel Maamor J on 30 August 2004 in reviewing the mandatory injunction ordered against the defendant that he had granted on 10 February 2004 (second appeal).

I (c) W-02–34 of 2007

An appeal by Tan See Siong and Soe Bank Tee (the defendant's directors) against the decision of Abdul Malik Ishak J (as he then was) on 20 December 2006 in finding the defendants' directors guilty for contempt and sentenced each of them to three weeks

imprisonment and a fine of RM15,000 and in default thereof to one month imprisonment (third appeal).

(d) W-02–1098 of 2008

An appeal by the plaintiff against the decision of Mohd Yazid Mustafa JC on 15 September 2008, in dismissing the plaintiff's application to expunge the order in allowing the defendant's application to regularise and reseal the order of Azmel Maamor J dated 30 August 2004 (fourth appeal).

FACTUAL BACKGROUND

[2] The material facts leading to these appeals are as follows. The defendant is a development company. They were developing 26 units of double story terrace houses on Lot 286, Taman Megah, Off Jalan Shell Gate, Bandar Port Dickson ('the project site'). The plaintiff is the owner of a house situated on a piece of land adjacent to the project site.

[3] It is the plaintiff's case that as a result of the earthworks carried out by the defendant's contractors, who had dug into the ground, there is a considerable degree of voids beneath the porch and driveway concrete slap of the plaintiff's house. It causes surface cracks as well as structural cracks affecting the foundation and safety of the plaintiff's house.

[4] On 23 March 2003, the plaintiff filed a writ against the defendant. In his statement of claim, the plaintiff prayed for:

(a) an injunction to restrain the defendant by itself or by its servants or agents or otherwise from further carrying out development works on the project site;

(b) an injunction whereby the defendant is required forthwith to carry out repairs of the damage and cracks on the plaintiff's house;

(c) damages; and

(d) costs.

[5] The plaintiff thereafter filed a summons in chambers, applying for an interim injunction. The prayers sought by the plaintiff in the summons in chambers were identical to the prayers sought in the statement of claim.

[6] On 10 February, after hearing the parties, Azmel Maamor J (as he then was) granted orders in terms of the plaintiff's prayers in the summons in

chambers. In effect, Azmel Maamor J granted in favour of the plaintiff:

(a) prohibitive injunction, preventing the defendant from further developing the land; and

(b) mandatory injunction, asking the defendant to rectify or repair whatever damages and cracks on the plaintiff's house.

[7] A notice of appeal was filed by the defendant against Azmel Maamor J's decision. Hence, the first appeal.

[8] After the above decision, there were various applications made by both parties before Azmel Maamor J. The relevant applications were:

(a) The plaintiff's notice of motion dated 7 May 2004 to cite the defendants' directors, Mr Tan See Siong and Soe Bank Tee for contempt for failing to obey the mandatory injunction ie to immediately repair the damages and cracks on the plaintiff's house.

(b) The defendant's summons in chambers dated 26 June 2004 seeking, inter alia:

(i) Whether the court had in fact, besides granting an interlocutory injunction restricting the defendant from carrying the works of the development side, had also granted a mandatory injunction whereby the defendant was ordered to immediately repair the damages and cracks on the plaintiff's house which were allegedly caused by the defendant's construction work on the development side.

(ii) In the event, the court had in fact not granted the mandatory injunction, then it is prayed that the order of the court made on 10 February 2004 be accordingly amended to reflect the actual orders made on 10 February 2004 and when so amended be resealed by the duly authorised officer of the court.

[9] In regard to the plaintiff's notice of motion, Azmel Maamor J on 28 April 2004 granted leave to cite the defendants' directors for contempt. With regard to the defendant's summons in chambers, Azmel Maamor J on 30 August 2004, granted the following orders:

(a) The injunctive order given on 10 February 2004 was for the purpose of restraining the defendant from carrying out the works on the project site.

(b) The court did not give the mandatory injunctive order wherein the defendant was ordered immediately to carry out the repairs of the damages and cracks which were allegedly caused by the development works on the project site.

[10] A notice of appeal was filed by the plaintiff against the decision of Azmel Maamor J in varying the orders that he had earlier made on 10 February 2004. Hence, the second appeal.

[11] The defendant did not file its defence. The plaintiff accordingly applied for leave to enter judgment in default of defence and for assessment of damages. On 18 May 2005, leave to enter judgment in default of defence was allowed against the defendant with damages to be assessed before the senior assistant registrar.

[12] On 24 February 2006, the senior assistant registrar ordered damages in the sum of RM99,000 with interest and costs. The registrar's certificate in respect thereof was issued and served on the defendant. But the defendant did not make the payment.

[13] Subsequently the contempt motion was heard by Abdul Malik J (as he then was). On 20 December 2006, the defendant's directors were found guilty. Each of them were sentenced to three weeks imprisonment and a fine of RM15,000 in default thereof to one month's imprisonment.

[14] Both the directors filed a notice of appeal against the conviction and sentence. Hence, the third appeal.

[15] On 10 December 2007, counsel for the plaintiff and the defendant appeared before Mohd Yazid Mustafa JC for clarification of Azmel Maamor J's decision of 30 August 2004. Counsel for both parties have had earlier produced a draft order with amended terms that they have agreed upon and requested Mohd Yazid Mustafa JC to approve it and a fair copy was to be issued out. However, Mohd Yazid Mustafa JC did not approve the order as agreed by the parties. Instead he approved the draft order which he perceived to be in line with the terms granted by Azmel Maamor J.

[16] The plaintiff then by encl 163 applied for the order as approved by Mohd Yazid Mustafa JC to be set aside or expunged. The application was dismissed.

[17] A notice of appeal was filed by the plaintiff against the said decision. Hence, the fourth appeal.

[18] I will deal with the appeals in turn.

THE FIRST APPEAL (W-02–207 OF 2004)

[19] This is the defendant's appeal. The defendant is appealing against the

interlocutory injunctive orders granted by Azmel Maamor J on 10 February 2004 which stated that:

(a) the defendant was restrained from further carrying out the development work (prohibitory order); and

(b) the defendant was required to carry out repairs of the damage and cracks of the plaintiff's house forthwith (mandatory order).

[20] It was the contention of the defendant that the above orders should not have been granted because the plaintiff had failed to show any nexus between the said development and the alleged cracks on the plaintiff's house. It was further contended that the second order that the defendant was to carry out repairs of the damages and cracks on the plaintiff's house, amount to a mandatory injunction. It should not have also been granted because the plaintiff had not shown that he had an unusually strong and clear case and that there are special circumstances before the court to grant the relief.

[21] With utmost respect, I disagree. Clearly, based on the facts of this case, there are serious issues and strong prima facie case to justify the decision in granting those injunctions. It is not in dispute that the defendant is the developer engaged in the development of the land adjacent to the plaintiff's house. It is also not in dispute that there was no other construction work going on at the adjacent land to the plaintiff's house. The only construction works carried out there was that of the defendant's. Hence, it is not unreasonable to conclude that the cracks to the plaintiff's house must be of the result of the earthworks done by the defendant's contractors. In fact, the defendant had neither said that it had not removed the soil beneath the plaintiff's house nor denied removing the soil.

[22] In cases of this nature, the central issue is whether or not the plaintiff has demonstrated that there exists a serious question to be tried which warrants the grant of the interim injunctions so as to enable the court to preserve the status quo pending the full adjudication of the issues raised in the writ of summons and the statement of claim. I would also add that at this juncture, what is required is for the plaintiff to establish that there exists a serious question to be tried and that the balance of convenience lies in favour of granting the injunction (see *American Cynamid Co v Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193).

[23] The facts deposed in this case, raised serious question to be tried and inquired into further. The balance of convenience and the importance of maintaining the status quo clearly lie with the plaintiff. The damages caused to the plaintiff's house were structural cracks and damages could not possibly

be an adequate remedy considering the fact that the premises is a family home and that the plaintiff should not be put to further risk and destruction of the house if remedial works are not effected by the defendant.

[24] For the above reasons, the defendant's appeal must be dismissed with costs. The deposit of this appeal to the plaintiff on account of taxed costs. The orders of Azmel Maamor J is therefore affirmed.

THE SECOND APPEAL (W-02–1021 OF 2004)

[25] This is the plaintiff's appeal. The main issue in this appeal is whether Azmel Maamor J has the power to review his own order that he made on 10 February 2004. As stated earlier, Azmel Maamor J, upon application by the defendant had set aside the mandatory injunction he had earlier granted on 10 February 2004. In setting aside the mandatory injunction, Azmel Maamor J stated that 'when I gave the order on 10 February 2004, I had only intended to give the prohibitive injunction and not the mandatory injunction'.

[26] Tuan Hj Sulaiman bin Abdullah ('Hj Sulaiman'), learned counsel for the defendant, submitted that Azmel Maamor J has the inherent jurisdiction and power, quite apart from O 20 r 11 of the Rules of the High Court 1980 ('RHC') to correct his own records and to bring the orders pronounced and extracted into line with the real intention. In support, he cited the House of Lords case of *William Laurie v George Lees* (1881) 7 App Cas 19 where Lord Penzance said:

> I cannot doubt that under the original powers of the court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every court.

[27] Reliance was also placed to the case of *Re Swire, Mellor v Swire* (1885) 30 Ch D 239 where Cotton LJ said:

> This application of somewhat unusual nature — a motion to an order after it has been passed and entered. The court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the court in fact had never adjudicated upon them, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its records, that it may be in accordance with the order really pronounced.

[28] With utmost respect, the above two cases have no application to the facts of the present case. The Federal Court in *Hock Hua Bank v Sahari bin Murid* [1981] 1 MLJ 143 had clearly held that the court had no power under any application in the same action to alter or vary a judgment regularly obtained after it had been entered or after it is drawn up, except under the slip rule in O 28 r 11 of the Rules of the Supreme Court 1957 (which is O 20 r 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court.

[29] In the present case, the defendant's application is not confined to the slip rule under O 20 r 11 of the Rules of the High Court 1980. Instead what the defendant wanted was for the court to alter or vary the order which had been entered against the defendant. I am of the view that the question whether or not the court could have given the mandatory injunction had been dealt upon hearing the arguments on merit in the plaintiff's application for injunctive orders. Therefore, the issue cannot be re-opened and Azmel Maamor J must be precluded from doing so upon the doctrine of functus officio. In short, Azmel Maamor J has no power to review, rehear, vary or set aside part of any judgment once it has been formally recorded. He was functus officio. Hence, the order made on 30 August 2004 was therefore a nullity.

[30] Accordingly, the plaintiff's appeal must be allowed with costs. The order of Azmel Maamor J is therefore set aside. The deposit is to be refunded to the plaintiff.

THE THIRD APPEAL (W-02–34 OF 2007)

[31] This is the defendant directors' appeal. Abdul Malik Ishak J had found both of them guilty for contempt and sentenced each of them to three weeks imprisonment and a fine of RM15,000 in default thereof to one month imprisonment. Before us, the arguments by Hj Sulaiman in support of this appeal are in two folds:

(a) The learned judge was wrong to enforce the order dated 10 February 2004 by way of committal proceedings because as at the date of the committal order dated 20 December 2006, the mandatory injunction order dated 10 February had been set aside.

(b) The mandatory injunction was ambiguous, uncertain or indefinite which made it void an thus cannot be made a basis for contempt proceeding and the defendant's directors against whom such order purports to run cannot be guilty of contempt of court in disregarding it.

[32] Mr Ashok, learned counsel for the plaintiff argued by stating that the committal proceeding was based on the failure of the defendant to repair the plaintiff's house as ordered by the High Court. The order to repair the plaintiff's house was made on 10 February 2004, but the defendant's directors had chosen to do nothing about it. Mr Ashok further submitted that there was nothing ambiguous about the order. According to him, the two directors knew exactly what they were supposed to do.

[33] With respect, there are merit in Mr Ashok's arguments. The issues that the mandatory injunction had been set aside or the mandatory injunction was ambiguous, uncertain or indefinite and thus void, were never raised during the contempt proceedings before Abdul Malik Ishak J. In fact, the defendant knew fully well of the terms of the injunctive orders sought by the plaintiff. This is due to the fact that the plaintiff obtained the injunctive orders after a lengthy and protracted inter parte hearing. It was vigorously contested for a period of over one year and the defendant throughout have had the benefit of legal advice. That explain the reasons why the defendant's directors did not during the contempt hearing raise any complaint of ambiguity of the injunctive orders. Neither was the issue that the mandatory injunction had been set aside ever taken nor raised before Abdul Malik Ishak J.

[34] In fact at the hearing before Abdul Malik Ishak J, both the defendant's directors have admitted breaching the mandatory injunction. Both of them have apologised to the court for their failure to comply with Azmel Maamor J's order dated 10 February 2004. This can clearly be seen from the evidence recorded from both the defendant's directors.

[35] The defendant's director, Mr Tan See Siong, during cross-examination said the following:

> Q. Was there any remedial works commenced by the defendant on the plaintiff's house?
>
> A. No, Yang Arif.
>
> Q. You did not pay the damages amounting to RM99,000.00?
>
> A. Yes, not paid yet.
>
> Q. Any other step you took to comply with the injunction order?
>
> A. No.

[36] Mr Tan See Siong further made the following admission under cross-examination:

> I admit that I knew fully well about the order dated 10.2.2004. And for two years, I have done nothing to repair the house.

[37] The other director, Mr Soe Bank Tee during cross-examination by learned counsel for the plaintiff testified as follows:

Q. Have you repaired the house?

A. Not until today.

Q. Were you advised to obey the injunctive order?

A. Yes.

Q. You agree with me that the injunctive order stipulate that you must repair the house and nothing done for the last 2 years?

A. Yes.

Q. You did not comply with Y.A. Dato' Azmel's direction as per page 22 of bundle F.

A. No (took time to reply).

Q. Were you advised to pay the assessment of the damages of RM99,000.00?

A. Yes. As of today (referring to 28.11.2006), no steps were taken to pay the RM99,000.00.

Q. Will you pay the judgment sum of RM99,000.00 inclusive of interest by today (referring to 28.11.2006)?

A. Not today, but will pay later.

Q. When will you pay?

A. I don't know. At the moment, I do not have the means to pay RM99,000.00.

[38] It is clear from the above, that both the defendant's directors have admitted in not complying with the order of Azmel Maamor J. Thus, Abdul Malik Ishak J was justified when he concluded:

> After two years ten month ten days down the road (calculated from 10 February 2004 to 20 December 2006), both the contemnors have yet to repair the damages and cracks to the plaintiff's house. The photographs exhibited in the affidavits speak volumes in favour of the plaintiff. To say the least, both the contemnors have been flippant in tendering their apologies without showing any remose or sincerity. Both contemnors have failed to purge their contempt. They adopted an arrogant and defiant stand in challenging the legality of the injunctive order. It was an exhibition of total defiance. They displayed their flagrant disregard to the orders of Azmel Maamor J (now FCJ). Sad to say, both the contemnors have treated this contempt proceedings with disclaim and they equated it 'like a walk in the park' and Soe Bank Tee has the audacity to tell this court that he would pay the assessed damages awarded by the SAR at a later date line 'as though he is buying a bric-a-brac in the flea market'.

[39] It is clear that the defendant's directors have deliberately in defiance of the court's order. They have had full knowledge of the intent and purpose of the order of Azmel Maamor J but decided not to obey. At the contempt proceedings they did not claim ignorant of the terms of the order on the ground of ambiguity. Neither did they raise the issue that the mandatory injunctive order had been set aside. Thus, the arguments of Hj Sulaiman has no merit. The cases cited by him to support his arguments are also of no application to the facts of the present case. On the facts of this case, the defendant's directors have had not only committed contempt by not obeying the court order, but by their own conduct have interfered with the due administration of justice.

[40] Accordingly, there is no reason for this court to disturb the finding and orders of Abdul Malik Ishak J. In the circumstances of this case, there is also no reason for this court to interfere with the sentenced imprisonment imposed against the defendant's directors.

[41] For the reasons that I have given, I would dismiss the defendant's directors' appeal with costs and confirm their convictions and sentences imposed upon them. The deposit of the appeal to the plaintiff on account of taxed costs.

THE FOURTH APPEAL (W-02–1098 OF 2008)

[42] This is the plaintiff's appeal. It is in relation to encl 163. The issue is whether Mohd Yazid Mustafa JC was right in deciding not to approve the draft order in relation to Azmel Maamor J's decision of 30 August 2004 as agreed by the parties. In other words, was the learned judicial commissioner right on his own accord in fairing the order based on what he perceived from the minutes of Azmel Maamor J.

[43] The learned judicial commissioner's reasoning of dismissing encl 163 was solely made on the ground that the plaintiff's application falls short of O 42 r 13 of the RHC in that the application to set aside or expunge was done after an expiry of 30 days from the date of the order. According to him, encl 163 was filed on 31 January 2008 ie almost four years after the order was granted by the learned judge.

[44] With utmost respect, I find that the learned judicial commissioner had missed the point. The plaintiff's application was not to vary the order of Azmel Maamor J of 30 August 2004. In fact, they had appealed against the said decision (second appeal). What the plaintiff intended to achieve by encl 163 was to set aside the fair copy issued by the learned judicial

commissioner. The reason being the learned judicial commissioner had totally ignored what had been agreed between the parties.

[45] There is merit on the plaintiff's complaint. Since those parties were present before Azmel Maamor J when the 30 August 2004 order was given they are in the best position to know what the order should be. They are in the better position than the judicial commissioner to know what had actually transpired before Azmel Maamor J four years ago. The learned judicial commissioner should have approved the order as agreed by the parties. Accordingly, he should have allowed the application made by the plaintiff in encl 163.

[46] For the above reasons, the plaintiff's appeal must be allowed with costs. The order of the learned judicial commissioner is therefore set aside. The deposit of this appeal is to be refunded to the plaintiff.

[47] My learned brothers Gopal Sri Ram JCA (now FCJ) and Sulong Matjeraie JCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.

Second and fourth appeals allowed with costs. First and third appeals dismissed with costs.

Reported by Kanesh Sundrum